No. 79-886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY AND GERARD THOMAS,
Petitioners,

v.

UNITED STATES OF AMERICA AND DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONERS

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June 20, 1980

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between attorneys for a corporation and corporate officers and employees, where the subject of the communications is a matter about which the attorneys' advice has been sought by the corporation, and the communications relate to the performance by the officers and employees of the duties of their employment.

2. Whether work-product materials prepared by or for attorneys in contemplation of litigation are accorded protection against involuntary disclosure in response to a summons issued under 26 U.S.C. § 7602 by the Criminal Enforcement Division of the Internal Revenue Service.

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THE UPJOHN COMPANY AND GERARD THOMAS,
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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 600 F.2d 1223, and is reproduced in Appendix A to the petition for certiorari. The opinion of the Magistrate and the orders of the district court adopting that opinion are not officially reported. They are reproduced in Appendices B, C and D to the petition for certiorari, as well as at pages 171a, 210a and 212a of the Joint Appendix.

JURISDICTION

The opinion of the court of appeals was issued on June 28, 1979. A timely petition for rehearing was denied on September 10, 1979. A petition for certiorari was filed within ninety days of the denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The pertinent parts of Sections 7402, 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.), Federal Rules of Civil Procedure 26(b)(3) and 81(a)(3), and Federal Rule of Evidence 501 are reproduced in an Appendix to this brief.

STATEMENT OF THE CASE

This case presents for review a judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed an order of the United States District Court for the Western District of Michigan enforcing a summons issued by a special agent of the Criminal Enforcement Division of the Internal Revenue Service. The summons was directed to The Upjohn Company ("Upjohn") and Gerard Thomas, its Vice President, Secretary and General Counsel. The summons demands production of the following documents and records:

> All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds

> of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries. App. 17a-18a.

Upjohn is engaged in the manufacture and sale of pharmaceuticals. It does business in the United States and approximately 150 foreign countries. Outside the United States, its business activities are conducted through both foreign subsidiaries and foreign branches of American subsidiaries. Mr. Thomas is a member of the bars of New York and Michigan. App. 26a. He has been Upjohn's general counsel since 1961. App. 88a. As general counsel, he serves as the principal attorney for Upjohn and each of its affiliates. *Id.*

The documents sought by the summons were prepared during an investigation voluntarily instituted by Upjohn in 1976. The investigation was initiated when Mr. Thomas was informed by the Company's independent accounting firm that payments to or for the benefit of foreign governmental officials might have been made by one of Upjohn's foreign subsidiaries. The purpose of the investigation, in which Mr. Thomas was assisted by outside counsel, was to obtain information required to advise Upjohn and its subsidiaries regarding legal issues arising from such payments, including anticipated civil or criminal litigation. App. 26a-27a, 91a-92a.

During their investigation, Mr. Thomas and outside counsel interviewed approximately 86 officers or employees of Upjohn or its affiliates. Those interviewed were selected from among the members of Upjohn's senior management because they exercised supervisory authority over the expenditures of an operating unit of the Company. Mr. Thomas and outside counsel made handwritten notes during the course of their interviews reflecting factual information as well as their impressions, conclusions and opinions. App. 27a-28a, 91a-93a.

As part of the investigation, the attorneys also prepared a questionnaire, which was sent to the members of senior management responsible for the activities of Upjohn's foreign affiliates. They were instructed to answer the questionnaire fully and accurately, and to submit responses directly to "Gerard Thomas, the Company's General Counsel." The questionnaire stressed that responses should be treated as "highly confidential." They have not subsequently been disclosed, and have consistently been treated as confidential. App. 27a-28a, 93a-94a.

On March 26, 1976, the Company voluntarily submitted a preliminary report to the Securities and Exchange Commission disclosing certain questionable foreign payments. Neither at that time nor subsequently did the Commission conduct any investigation of the Company with respect to such payments. A copy of the report was contemporaneously submitted to the Internal Revenue Service. After receipt of the report, the Service began a criminal investigation of

the income tax returns of the Company for the years 1972, 1973 and 1974. App. 29a.[1]

During the course of their criminal investigation, special agents requested and were given lists of all of those who had been interviewed by Upjohn's counsel, as well as all of those who had responded to the questionnaire. The Company offered to make all of those persons, as well as any other officers or employees selected by the Service, available for interrogation. The Company also agreed to advise the Service when those resident in foreign countries were otherwise present in the United States. Many such persons travel regularly to the United States to visit Upjohn's corporate headquarters or for other purposes. App. 30a.

As part of their investigation, special agents served upon Upjohn approximately 275 Information Document Requests. In response, the agents were afforded access to extensive information from the books and records of Upjohn, its branches and subsidiaries. In addition, the agents interrogated at least 25 of the employees who had previously been interviewed by Upjohn's counsel. Certain of the interviews were conducted by the Service outside the United States. App. 76a-77a. The Service has never been refused an interview with any officer or employee of the Company. From time to time, Upjohn informed the Service that

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[1] The inquiry conducted by Mr. Thomas and outside counsel continued after the initiation of the Service's investigation. As a result of additional information obtained by them, an amendment to the Company's preliminary report was filed with the Securities and Exchange Commission on July 29, 1979 and submitted contemporaneously to the Internal Revenue Service.

officers or employees based overseas would be in the United States. In some instances, the Service did not elect to utilize those opportunities for interrogation.

During the Service's investigation, no objections were made by Upjohn to inquiries into payments made by foreign branches and other entities which might have affected the Company's consolidated United States tax returns. On grounds of relevance, however, Upjohn's counsel declined to allow inquiries into questionable payments made by Upjohn's foreign subsidiaries without a prior showing that such payments could have affected the Company's consolidated United States tax returns.[2] No effort was ever made by the Service, by summons or any other procedure, to compel any witness to answer any questions regarding matters that Upjohn contends cannot have affected its United States tax liability.

In addition, Upjohn voluntarily provided to the Service two schedules summarizing all of the questionable payments discovered by the Company's attorneys. App. 69a-71a. One schedule lists the date, amount, payor and country of all questionable payments which the Com-

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[2] Upjohn contended that questionable payments made by subsidiaries which were "controlled foreign corporations" within the meaning of 26 U.S.C. § 952(c) could not have affected its own consolidated tax returns for the years in question. Under the tax laws as they existed prior to 1976, overseas bribes or kickbacks—which would not be deductible on a United States tax return if made by a United States taxpayer—would have reduced the earnings and profits of the controlled foreign corporation and thus would have been properly eliminated from "subpart F income" under 26 U.S.C. § 952 which was taxable to Upjohn, the United States parent. On November 28, 1977, the Service issued Revenue Ruling 77-442, 1977-2 C.B. 264, which formally adopted Upjohn's contention on the issue.

pany concedes might be relevant to its consolidated United States tax returns. The other schedule provides descriptive information regarding payments which the Company believes cannot have affected its United States tax liability. Special agents of the Service were permitted to inspect all documents and records discovered during Upjohn's investigation regarding payments included in the first schedule. These included such materials as cancelled checks, invoices and vouchers. App. 30a.

Despite the extensive information available to it, the Service insisted that it also be provided with the attorneys' notes of interviews and the responses to their questionnaire. On November 23, 1976, prior to conducting any interview of any Upjohn employee, a special agent issued the summons in dispute here. Upjohn promptly declined to produce two of the categories of documents sought by the summons, the attorneys' interview notes and the responses to counsel's questionnaire, on grounds that they are privileged communications between client and attorney and constitute the work-product of attorneys prepared in anticipation of litigation.

On August 31, 1977, more than nine months after the summons was issued, the United States filed a petition for enforcement in the district court. The matter was referred by the district court to a Magistrate, who concluded that application of the attorney-client privilege should be limited to communications made to counsel by members of Upjohn's "control group." He was of the view that none of the officers and employees from whom Upjohn's attorneys had obtained information was a member of such a "control group."

The Magistrate also concluded that the Service had made a sufficient showing of necessity to overcome the protection of the work-product rule. On the basis of these conclusions, he recommended to the district court that the summons be enforced. App. 171a. The district court adopted the Magistrate's opinion in a brief order. App. 210a, 212a.

The court of appeals recognized that the scope of the attorney-client privilege as applied to corporations is now disputed and uncertain. It acknowledged that other circuits have held that communications made to counsel by subordinate corporate employees are generally privileged if the subject of the communications is a matter about which counsel has been requested to provide legal advice and if it involves the performance by the employees of their corporate duties. Nonetheless, the court of appeals rejected such a rule, and aligned itself with those courts which have approved the more restrictive "control-group" test recommended by the Magistrate.

With respect to the work-product issue, the court of appeals did not consider whether the protection usually accorded work-product materials had been overcome by a showing of necessity. Instead, it stated in a brief footnote that no such protection is available in responding to a summons issued by the Service pursuant to 26 U.S.C. § 7602. The court remanded to the district court for the limited purpose of determining which of the officers and employees from whom Upjohn's attorneys received communications were part of the Company's "control group."

SUMMARY OF ARGUMENT

I

The purpose of the attorney-client privilege is to enable clients to obtain legal assistance from counsel fully informed of the relevant facts. The privilege thus plays an important role in promoting observance of law and the effective administration of justice. This purpose applies to corporate as well as individual clients. Almost every aspect of a corporation's conduct is subject to statutory or regulatory requirements. Many of these are complex and pervasive. In order to achieve and maintain compliance with these requirements, corporations need continuing assistance from counsel fully informed of all relevant aspects of the corporation's conduct.

If the privilege is to serve its intended purpose, all corporate employees who have relevant knowledge of matters on which counsel's assistance has been sought must be able to speak candidly to the attorney without fear that he may subsequently become a witness against them or their employer. Adoption of a subject-matter test for the application of the attorney-client privilege to corporations will protect from involuntary disclosure, and thus encourage, candid communications between corporate employees and counsel. Such a test will, as several lower federal courts and state courts generally have recognized, best promote the essential objectives of the privilege. In addition, it will facilitate counsel's important efforts to bring about compliance with the multitudinous laws and regulations that govern corporate conduct.

The subject-matter test does not protect relevant evidence from discovery or encourage irresponsibility

on the part of company executives; indeed, as in this case, it encourages voluntary compliance efforts and facilitates enforcement action by public authorities. The control-group test adopted by the court of appeals rests upon a misconception of the nature and structure of a corporation, which acts through and is bound by all its employees—not merely by a few senior executives who cannot have full knowledge of every corporate action that may have legal implications. To define the privilege so narrowly would deprive corporations of informed legal assistance and seriously prejudice observance of the law and the efficient administration of justice. In addition, because of the unpredictability inherent in the concept of the control group, it would significantly hamper the efforts of corporate managers and counsel to comply with the law's complex requirements, without the intervention of public authorities, and would discourage voluntary legal investigations, such as that involved in this case.

II

The work-product rule, articulated over thirty years ago in *Hickman* v. *Taylor,* 329 U.S. 495 (1947), but with sources deep in both state and English practice, is an essential bulwark of the adversary system. It assures a litigant or prospective litigant that his lawyer represents his interest and only his interest. It safeguards the lawyer's knowledge, analyses and litigation strategy against involuntary disclosure to an adversary.

When the Internal Revenue Service issues an administrative summons against a taxpayer—whether a corporation or an individual—it establishes an intensely adversarial relationship. The statute authoriz-

ing such summonses contains no suggestion that the recipient is to be denied the protection of the work-product rule. Nothing in the legislative history of the authorizing statute provides a basis for implying any intention to deny such protection. Indeed, in related situations Congress has acted promptly to strengthen the protections afforded taxpayers against the Service's demands.

Apart from the almost cursory observation of the court below, no court has held that the issuance of a summons by the Service eliminates work-product protection. Moreover, the result reached by the court below cannot logically be limited to summonses issued by the Service; it would with equal force deny work-product protection to recipients of summonses from a wide range of governmental agencies whose statutory summons authority cannot in principle be distinguished from that of the Service. If that view were accepted, it would follow that, despite the considerations underlying *Hickman* v. *Taylor,* which have never been questioned by Congress, work-product protection would no longer be available in a substantial and important part of the litigation in the federal courts.

The Service has a powerful arsenal of investigatory weapons for use in the enforcement of the tax laws, both in this country and abroad. It has declined to use many of those weapons in this case. Instead, it seeks a shortcut through access to the fruits of counsel's efforts in anticipation of litigation. If the mere convenience of an adversary were controlling, there would be no work-product protection at all. The asserted convenience of the Service in this case cannot establish an intention on the part of Congress to eliminate work-product protection or demonstrate

the requisite hardship that must be shown to overcome such protection.

ARGUMENT

I.

THE MATERIALS DEMANDED BY THE SUMMONS SHOULD BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AGAINST INVOLUNTARY DISCLOSURE

The first issue presented is whether the confidential communications between Upjohn's counsel and its officers and employees are protected by the attorney-client privilege. The court of appeals concluded that only one of the established requirements [3] for the privilege's protection was not satisfied: Whether the officers and employees to and by whom the communications were made constituted part of counsel's "client" for purposes of the privilege.[4] The court of appeals held that, in the case of a corporation, the "client" consists only of the corporation's controlling group of central managers.[5]

In so holding, the court aligned itself with those courts that have adopted the standard for the application of the privilege first announced in *City of Phila-*

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[3] *E.g.*, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[4] The court found or left undisturbed findings that legal advice had been sought by Upjohn from professional legal counsel, Pet. App. 12a-13a; App. 174a-175a; that the employees' communications related to the purposes for which that legal advice was sought, *id.* at 13a; App. 175a; that the communications were made in confidence, *id.* at 14a; App. 176a; and that the protection of the privilege has not been waived, Pet. App. 7a n.12; 600 F.2d at 1227 n.12.

[5] Pet. App. 1a; 600 F.2d at 1227.

delphia v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa.), *mandamus & prohibition denied sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). Although decisions following *City of Philadelphia* have frequently reached irreconcilable results, they have generally sought to limit the privilege to communications with a small group of senior corporate managers who have authority to make, or to take substantial part in, a decision that the corporation might make on the attorney's advice. The court of appeals refused to follow several courts that have rejected this control-group test, and have applied the privilege to communications made by subordinate employees to corporate counsel where the subject matter of the communications relates to the employees' duties of employment. *E.g.*, *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd by an equally divided court*, 400 U.S. 348 (1971); *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc).[6]

A. The Important Public Policies Served by the Privilege Require That It Be Afforded a Wider Scope of Application.

Throughout our legal history, courts and commentators have recognized that the attorney-client privilege is essential to the effective administration of justice.

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[6] Although either the control-group or the subject-matter test has been applied by most of the courts that have considered this question, some courts have adopted variations upon, or amalgamations of, those tests. *E.g.*, Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978); Duplan Corp. v. Deering Millikin, Inc., 397 F. Supp. 1146 (D.S.C. 1974), *aff'd on other grounds*, 540 F.2d 1215 (4th Cir. 1976); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35 (E.D.N.Y. 1973).

More than 150 years ago, Mr. Justice Story observed that the privilege "is indispensable for the purposes of private justice." *Chirac* v. *Reinicker,* 24 U.S. (11 Wheat.) 280, 294 (1826). *See also Fisher* v. *United States,* 425 U.S. 391, 403 (1976); *Hunt* v. *Blackburn,* 128 U.S. 464, 470 (1888); *Connecticut Mutual Life Insurance Co.* v. *Schaefer,* 94 U.S. 457, 458 (1876); *Blackburn* v. *Crawfords,* 70 U.S. (3 Wall.) 175, 192-93 (1865). An early state court opinion emphasized that "[t]here is no principle of law which rests on a sounder basis, or which is supported by a more uniform chain of adjudication." *Parish* v. *Gates,* 29 Ala. 254, 259 (1856). More than a century later, a noted commentator described the privilege as perhaps "the pivotal element of the modern American lawyer's professional functions." Hazard, *An Historical Perspective on the Attorney-Client Privilege,* 66 Cal. L. Rev. 1061, 1061 (1978).[7]

Adherence to the privilege is commanded by important public policies. The purpose of the privilege is ultimately to assure full and candid communications between attorney and client. It "rests on the need for advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel* v. *United States,* 100 S.Ct. 906, 913 (1980). It is only upon the basis of such communications that "the abil-

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[7] Similar policies have long been adhered to by the English courts, as well as the courts of numerous other foreign jurisdictions. A compilation of opinions on foreign law by attorneys practicing in a number of common law and civil law jurisdictions was filed with this Court on August 3, 1970 by the Respondents in Decker v. Harper & Row Publishers, Inc., No. 113, October Term 1970, 400 U.S. 348 (1971).

ity to obtain informed legal advice will remain unfettered." *Fisher* v. *United States,* 425 U.S. at 404.

The attorney-client privilege is essential to the interests of justice, as well as the interests of the client.[8] *Id.* Without frank communications between counsel and client, unmeritorious claims may be pressed in wasteful litigation, and meritorious claims or interests may not be identified or pursued. Without such candor, the attorney cannot effectively keep his client abreast of relevant developments in the law, apprised of potential legal issues, or informed as to the legally appropriate manner in which to arrange his affairs. Needless controversy, inefficiency and injuries to the interests of others may result.[9]

The public policies underlying the attorney-client privilege are applicable whether the client is an individual or a corporation. No less than an individual, a corporate enterprise requires the assistance of informed legal counsel. If a corporation's attorney is denied full and candid information regarding his client's conduct and practices, the same needless controversies may occur, the same inefficiencies will result, and the same injuries to others are threatened.[10]

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[8] *E.g.*, Miller, *The Challenges to the Attorney-Client Privilege,* 49 Va. L. Rev. 262, 268-69 (1963) [hereinafter cited as Miller].

[9] *E.g.*, Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 Yale L.J. 953, 955 (1956).

[10] An empirical study suggests that clients are well aware of the privilege, and that it induces them to be candid with their attorneys. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine,* 71 Yale L.J. 1226, 1262 (1962). It also suggests that attorneys are heavily influenced by the existence of the privilege in encouraging candor on the part of clients. *Id.* at 1270. On the

For these reasons, this Court has long recognized that the protection of the privilege is afforded corporate as well as individual clients. *E.g., United States* v. *Louisville & Nashville Railroad,* 236 U.S. 318, 336 (1915).[11] Indeed, as we show below, the purposes served by the privilege are even more compelling in the case of corporations, particularly those that are large and diversified.

B. The Realities of Modern Corporate Organizations Require That the Privilege Be Afforded a Wider Scope of Application.

Resolution of the issue presented here must take into account the structure of modern corporate organizations. That structure underscores the importance of the policies which the attorney-client privilege is intended to promote, and makes clear that a grudging construction of the scope of the privilege, such as that adopted by the court below, is contrary to the interests of both corporate clients and the public.

Extensive studies have been conducted in recent years regarding corporate structures and intra-corporate communication processes. Two principles significant to the issues of this case emerge from those studies. First, corporations, particularly large and diversified corporations, are characteristically decentralized, and corporate employees at their middle and lower

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other hand, the survey shows that judges do not consider the privilege disruptive of the administration of justice and only seldom find that it excludes evidence that is of substantial importance. *Id.* at 1272.

[11] *See also, e.g.,* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 322 (7th Cir. 1963); Garner v. Wolfinbarger, 430 F.2d 1093, 1097 n.10 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971); United States v. United Shoe Machinery Corp., 89 F. Supp. at 358-59.

levels are often delegated significant discretion regarding major business activities.[12] Indeed, one court has found that relatively low-ranking employees frequently exercise greater actual authority than more senior executives over significant aspects of a corporation's affairs. *Commonwealth* v. *Beneficial Finance Co.*, 360 Mass. 188, 275, 275 N.E.2d 33, 83 (1971), *cert. denied*, 407 U.S. 910, 914 (1972).

The discretion afforded subordinate employees can, and frequently does, result in serious corporate liability. Under established principles of agency, knowledge acquired by an employee during the course of employment is imputed to the corporation. *E.g., Franklin Supply Co.* v. *Tolman*, 454 F.2d 1059, 1070 (9th Cir. 1972); *Bailey* v. *Gulf Insurance Co.*, 389 F.2d 889, 891 (10th Cir. 1968). Moreover, within their apparent or actual authority, corporate employees can bind the corporation and subject it to liability in tort or under the criminal laws.[13] *See generally* 10 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, §§ 4877 *et seq.*, §§ 4942 *et seq.* (rev. perm. ed. 1978). A corpora-

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[12] *See, e.g.*, Developments in the Law—*Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1254 & n.61, 1259 & n.78 (1979) [hereinafter cited as *Corporate Crime*]; Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 Va. L. Rev. 1099, 1140 (1977) [hereinafter cited as Coffee].

[13] The doctrine of *respondeat superior* has long been part of the law. *See, e.g.*, Hern v. Nichols, 1 Salk. 289 (1709); Philadelphia, Wilmington & Baltimore R.R. v. Quigley, 62 U.S. (21 How.) 202, 210 (1858); Lake Shore & Michigan Southern Ry. v. Prentice, 147 U.S. 101, 107 (1893); New York Central & Hudson River R.R. v. United States, 212 U.S. 481, 483 (1909); United States v. A & P Trucking Co., 358 U.S. 121, 125 (1958).

tion may be held criminally liable for its employee's misconduct even if the illegal action was expressly forbidden by his supervisors, and even if it occurred despite good-faith efforts to prevent it.[14]

The second principle significant here is that central management realistically cannot be aware of all that occurs within large corporate enterprises. Studies of corporate behavior have concluded that an important factor leading to wrongful or illegal conduct by employees is the difficulty of the communication process between central policy makers and lower-echelon employees.[15] Corporate executives often cannot effectively explain to subordinate employees what conduct is wrongful or illegal.[16] Even when their instructions are clearly understood, there may be serious difficulties in implementing those instructions in the field.[17] Communications upward to central management are also imperfect. Corporate managers frequently receive so much information from within the organization that they may be unable to perceive the existence or seriousness of a problem.[18]

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[14] *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). *See also* Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 Yale L.J. 1091, 1095 (1976).

[15] *E.g.*, Sonnenfeld & Lawrence, *Why Do Companies Succumb to Price-Fixing?*, 1978 Harv. Bus. Rev. 145, 146 (July-Aug.) [hereinafter cited as Sonnenfeld & Lawrence].

[16] Whiting, *Antitrust and the Corporate Executive II*, 48 Va. L. Rev. 1, 15 (1962).

[17] *Corporate Crime*, 92 Harv. L. Rev. at 1275 n.168.

[18] Coffee, 63 Va. L. Rev. at 1139 n.147. Nobel laureate economist Kenneth Arrow has observed the same problem: "[T]he overload

As a result of these difficulties, many observers have recognized that corporate counsel must perform important roles in communicating and implementing legal policy at all levels of the corporate structure. Indeed, it has been suggested that attorneys should conduct regular internal corporate inquiries to prevent illegal or wrongful activity.[19] Counsel can, however, perform these important responsibilities effectively only if he has detailed and accurate information regarding the corporation's actual practices and conduct. *Compare Trammel* v. *United States,* 100 S.Ct. at 913. Because of the decentralization and complexity of large corporate structures, such information realistically is available only if counsel engages in direct and candid communications with subordinate corporate employees.[20]

The importance of counsel's participation in corporate self-regulation is increased by the multiplicity of laws, directives and regulations confronting the modern corporation. Elaborate webs of legal requirements now surround virtually every activity of large corporate enterprises.[21] Those requirements are often

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of the information and decision making capacity'' leads organizational managers to disregard negative information which is not ''congruent with previous beliefs.'' K. Arrow, The Limits of Organization 73-75 (1974).

[19] *Administered Prices: Hearings Pursuant to S. Res. 52 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 87th Cong., 1st Sess. 17425, 17645, 17713-14 (1961).

[20] *E.g.,* Sonnenfeld & Lawrence, 1978 Harv. Bus. Rev. at 151-52, 154, 156.

[21] Detailed federal and other governmental requirements now reach disparate matters ranging from pricing policies to employment practices, from safety goggles to chemical waste disposal. The detail and comprehensiveness of these multitudinous provi-

subtle and complex, and careful legal analyses frequently are needed to distinguish lawful from unlawful conduct. As this Court recently observed with respect to the Sherman Act, "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978). Conduct falling close to the prohibited area may be "salutary and procompetitive" and should be encouraged. *Id.* at 441. Subordinate corporate employees cannot, however, reasonably be expected to understand, or even be aware of, the gossamer distinctions of the antitrust laws, safety and environmental regulations, prohibitions against employment discrimination, state and federal tax laws and numerous other important governmental requirements. As a practical matter, large corporations can effectively persuade their employees to conform to these and other legal requirements only if those employees are encouraged to speak candidly with, and are permitted to receive frank legal advice from, the corporation's attorneys.[22]

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sions are illustrated in, for example, Council on Wage and Price Stability, *Catalog of Federal Regulations Affecting the Iron and Steel Industry* (1976), and Small Business Administration, *Catalog of Federal Paperwork Requirements* (1979).

[22] There is overwhelming evidence that numerous governmental programs and policies depend primarily for effective implementation and enforcement upon voluntary compliance, assisted and directed by the efforts of corporate counsel. Without the effective intervention of corporate counsel as agents of voluntary law enforcement, such programs and policies would be substantially less successful. *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. at 1164; Burnham, *The Attorney-Client Privilege in the Corporate Arena,* 24 Bus. Law. 901, 913-14 (1969) [hereinafter

C. The Privilege Should Encompass Communications Between Counsel and All Corporate Employees Who Have Information Relevant to Advice Sought by the Corporation From Counsel.

The formulation of the subject-matter test recently adopted by the Eighth Circuit in *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1978) (en banc), provides an appropriate framework for the resolution of this complex issue. Unlike the control group test applied by the court below, the subject-matter test vindicates the important public policies served by the attorney-client privilege and takes adequate account of the realities of corporate structures and decision-making. This test, first suggested by Judge Weinstein, is designed to "strike a balance between the privilege's goal of promoting freedom of consultation and full disclosure between attorney and a seeker of legal services, and the law's need for relevant evidence." 2 J. Weinstein & M. Berger, *Commentary on Rules of Evidence for United States Courts and Magistrates* ¶ 503(b)[04], at 503-44 (1979) [hereinafter cited as Weinstein & Berger]. The requirements of the test are:

(1) The communication must have been made for purposes of seeking legal advice, that is, "in contemplation of future professional action by the attorney." *Id.* at 503-45.[23]

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cited as Burnham]; Shenefield, *Compliance Programs As Viewed from the Antitrust Division,* 48 Antitrust L.J. 73 (1979) [hereinafter cited as Shenefield]; Note, *The Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 Harv. L. Rev. 424, 425 n.6 (1970).

[23] Judge Weinstein observes that for purposes of this standard "[i]t is irrelevant whether [the attorney] was acting as house counsel or outside counsel." *Id.*

(2) The employee making the communication must have done so at the direction of a corporate superior.

(3) The corporate superior must have directed the employee to communicate with the attorney for purposes of securing legal advice for the corporation.[24]

(4) The subject matter of the communication must concern the employee's duties for the corporation.[25]

(5) Consistent with the size and nature of the corporation, the communication must not have been disseminated beyond those persons who actually have a need to know its contents.

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[24] The directions called for in the second and third requirements were unquestionably issued in this case, App. 27a-28a, but it should be observed that in many situations such directions might, for example, have to be inferred from more general directions given by a corporate superior to the attorney, in which subsequent communications with subordinate employees were contemplated. In many situations, a rigid requirement that explicit instructions be issued by corporate superiors directly to their subordinates would exalt form over substance. The central point of the requirement is presumably only that the employee have acted in accordance with his corporate responsibility.

[25] Although the issue is not important for purposes of this case, it would appear that here, as with the second and third requirements, an unduly rigid interpretation would needlessly limit the privilege's application in other cases. Any information that relates to the corporation's business activities or practices should satisfy this requirement, even if, for example, provided by an employee in one department or function about the wrongdoing of another employee in another department or function. An employee's "duties" to the corporation should not, in other words, be narrowly restricted to the day-to-day performance of his personal functions, but should instead encompass his responsibility to help assure the lawful and effective operation of all elements of the corporation.

Application of the test described above would bring within the privilege's protection all or virtually all[26] of the communications at issue here. Nonetheless, petitioners do not believe that each of the proposed requirements need necessarily be adopted in the form suggested by Judge Weinstein, or in the form approved by the Eighth Circuit in *Diversified*. It should suffice if a corporation's attorney-client privilege were understood to encompass all communications made in confidence by corporate employees to corporate counsel regarding matters within their knowledge as employees and relevant to advice sought by the corporation from counsel. Adoption by this Court of such a principle would assure counsel access to all of the information relevant to his professional responsibilities, permit a reasonable degree of flexibility in the privilege's application, and leave appropriate room for reasoned application of the test in the lower courts.[27]

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[26] Certain of the persons to and from whom communications were made evidently were no longer employed by Upjohn at the time of the communications. App. 175a. Petitioners believe that, regardless of the test adopted by the Court, the privilege should encompass communications between former employees and counsel regarding a corporation's affairs during the period of their employment, if the privilege's protection would otherwise be applicable. *See* United States v. Lipshy, 1979-2 U.S. Tax Cas. (CCH) ¶ 9628, at 88,278 (N.D. Tex. 1979); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. at 1165-67. *Compare* Fed. R. Crim. P. 16(a)(1)(A); United States v. Hughes, 413 F.2d 1244, 1253 (5th Cir. 1969), *cert. vacated as moot,* 397 U.S. 93 (1970).

[27] In commenting on a test similar to that proposed here, one commentator observed that:

> Because this approach would provide a court with a set of objective standards for determining whether an employee functions as a corporate client, an attorney should be able to predict with a reasonable degree of certainty whether a contemplated communication would be privileged. The unpredictability that would remain would be little more than that

D. The Principles of the Subject-Matter Test Are Supported by State Authority, to Which Reasonable Deference Should Be Given.

In adopting Federal Rule of Evidence 501, Congress recognized that the societal interests and relationships served by the evidentiary privileges have traditionally been regulated by the states, and it sought to protect state policies against unnecessary erosion or compromise.[28] Consistent with that purpose, this Court only last Term carefully considered state law decisions in determining the proper scope of the marital privilege. *Trammel* v. *United States,* 100 S.Ct. at 911-12, nn.9-10.[29]

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which presently faces an attorney with an individual client, since the suggested approach would be analogous to the personal privilege. The increased predictability would thus promote the major purpose of the privilege—fostering the freedom to seek legal advice—by removing fears that the attorney might subsequently be compelled to disclose the communication.

Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. 360 (1970).

[28] Congress rejected a more rigid rule drafted by the Advisory Committee on the Proposed Federal Rules of Evidence, and instead instructed the federal courts to define the scope of privileges in federal question cases by reference to "the principles of the common law as they may be interpreted . . . in light of reason and experience." It did so after numerous objections that the proposed rule would have seriously undermined state policies. It is significant that no other portion of the proposed rules received such careful attention, or underwent such extensive revision. *See* S.Rep. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051; 120 Cong. Rec. 40891 (1974) (remarks of Rep. Hungate).

[29] It has been argued that the impact of state law is even greater, since Congress should not, under ordinary circumstances, be able to abrogate the states' law of privilege, even in cases involving federal law. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today,* 31 Tul. L. Rev. 101, 119-20 (1956). While this Court appears to have rejected Professor

The attorney-client relationship also involves substantial state interests, reflected in long-standing state regulatory systems, and a similar consideration of state authorities is appropriate here. *Garner* v. *Wolfinbarger,* 430 F.2d at 1100. *See also* Comment, *Evidentiary Privileges in the Federal Courts,* 52 Cal. L. Rev. 640, 648 (1964).

The overwhelming majority of state courts afford corporations protection under the attorney-client privilege substantially similar to that provided by the subject-matter test. For example, the California Supreme Court held in *D.I. Chadbourne, Inc.* v. *Superior Court,* 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964), that "the public policy behind the attorney-client privilege requires that an artificial person be given an equal opportunity with a natural person to communicate with its attorney, within the professional relationship, without fear that its communications will be made public." *Id.,* 60 Cal. 2d at 736, 388 P.2d at 709, 36 Cal. Rptr. at 477. It concluded that communications made by lower-level corporate employees to the corporation's counsel are privileged if they were made in confidence for the purpose of securing legal advice for the corporation. *Id.* The decision in *D.I. Chadbourne* reflects the virtually unanimous view of those states that have considered the question. *See, e.g., Stewart Equipment Co.* v. *Gallo,* 32 N.J. Super. 15, 17, 107 A.2d 527, 528 (1954); *Ford Motor Co.* v *O.W. Burke Co.,* 59

Louisell's constitutional argument, *see, e.g.,* United States v. Gillock, 100 S. Ct. 1185, 1191 (1980), his reasoning nevertheless strongly supports giving state law significant weight in determining the scope of privileges in federal question cases.

Misc. 2d 543, 546, 299 N.Y.S.2d 946, 949 (Sup. Ct. 1969).[30]

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[30] The following additional states have indicated, by rule or judicial decision, preference for a broad test in defining the scope of the attorney-client privilege for corporations: *Alabama:* Jay v. Sears, Roebuck & Co., 340 S.2d 456, 457-58 (Ala. Civ. App. 1976); *Delaware:* Wise v. Western Union Telegraph Co., 178 A. 640, 644 (Super. Ct. 1935); Texaco, Inc. v. Phoenix Steel Corp., 36 Del. Ch. 456, 461, 264 A.2d 523, 524 (1970) (adopting *United Shoe Machinery* test); *Georgia:* Fire Ass'n v. Flemming, 78 Ga. 733, 3 S.E. 420, 422-23 (1887); *Kansas:* Kan. R. Civ. Proc. 60-426(c) (communications to counsel through "authorized representative" of corporation is privileged); *Minnesota:* Schmitt v. Emery, 211 Minn. 547, 552, 2 N.W.2d 413, 416 (1942); *Montana:* State ex rel. Union Oil Co. v. District Court, 160 Mont. 229, 337, 503 P.2d 1008, 1012 (1972); *Missouri:* Lindberg v. Safeway Stores, Inc., 525 S.W.2d 571, 572 (Mo. Ct. App. 1975); State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn, 363 Mo. 1065, 1072, 257 S.W.2d 69, 73 (1953); *Nevada:* Nev. Code Tit. 4 ch. 49 § .045 (1971); *Ohio:* Ex parte Schoepf, 74 Ohio St. 1, 15, 77 N.E. 276, 279 (1906); *Pennsylvania:* Davenport Co. v. Pennsylvania R.R., 166 Pa. 480, 486, 31 A. 245, 246 (1895); *South Dakota:* S. D. Code Tit. 19 ch. 13 §§ 2-3 (Rules of Evidence 502 (a) & (b) (1979)); *Utah:* Jackson v. Kennecott Copper Corp., 27 Utah 2d 310, 314-15, 495 P.2d 1254, 1257 (1972) (adopting *United Shoe Machinery* test); *Virginia:* Robertson v. Commonwealth, 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943); *Wisconsin:* Wis. Code § 905.03 (1)(a) (1975), State v. Circuit Court for Waukesha County, 15 Wis. 2d 311, 318, 112 N.W.2d 686, 689 & n.3 (1961); Horlick's Malted Milk Co. v. A. Speigel Co., 155 Wis. 201, 212, 144 N.W. 272, 276 (1913).

Only one state's appellate courts have indicated an inclination toward the narrow control-group test. *See* Day v. Illinois Power Co., 50 Ill. App. 52, 199 N.E.2d 802, 806 (1964). That ruling, although cited in dicta in several later cases of the intermediate appellate courts, has been seriously undermined by the Illinois Supreme Court's decision in Cox v. Yellow Cab Co., 61 Ill. 2d 416, 419-20, 337 N.E.2d 15, 18 (1975). While the *Cox* court had no occasion to resolve the issue, it recited various of the considerations which would govern such a ruling, citing and relying upon *D. I. Chadbourne*, giving a strong indication of its leaning towards the broad approach adopted in that case. It is apparent that the issue has not been finally determined by the Illinois courts.

These decisions by the state courts strongly confirm that the subject-matter test should be adopted by this Court to define the scope of the privilege's protection to corporations. They embody the "principles of the common law" which Congress expected to be utilized to define federal privileges. Fed. R. Evid. 501. Consistent with both the directions of Congress and this Court's decision in *Trammel,* they are entitled to substantial weight. Moreover, even apart from their persuasiveness as authorities, they reflect well-considered state policies, regarding matters of long-standing state interest. The adoption of a federal rule that afforded substantially less protection to the attorney-client relationship, such as that approved by the court below, would seriously undermine these important state policies.[31]

E. The Court of Appeals' Reasons for Rejecting the Subject-Matter Test Are Invalid.

The court of appeals below sought to explain its adoption of the narrow control-group test in the following terms:

> The "subject matter" test encourages senior managers purposely to ignore important information they have good business reasons to know and use.

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[31] A federal rule of privilege significantly narrower than prevailing state privileges would inevitably displace the state rules in a substantial number of situations. In any situation in which an issue or potential issue might have federal as well as state law implications, prudent counsel would necessarily have to conduct themselves in conformity with the narrower rule. The pervasiveness of federal law in corporate transactions, particularly those involving interstate commerce, would assure very broad application of the federal rule and widespread displacement of state policies.

> Corporate counsel should not be the exclusive repository of unpleasant facts. The law should not encourage corporate managers to shield themselves from information about possibly illegal transactions. Such purposeful ignorance does not serve the interests of moral corporate conduct or the protection of stockholder equity. Pet. App. 5a-6a; 600 F.2d at 1227.

The court's analysis is mistaken in every detail. It misconceives the implications of the subject-matter test and the circumstances of this case. Far from producing the disadvantages asserted by the court, the subject-matter test is well calculated to achieve the public policies which the privilege is intended to promote and to facilitate corporate compliance with legal and regulatory requirements.

At the outset, it is important that the subject-matter test cannot in any sense render counsel "the exclusive repository of unpleasant facts." Under any formulation of the privilege, information obtained by an attorney from corporate employees remains with those employees, and is thus always fully subject to investigation and discovery.[32] The issue here is not whether

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[32] The fact that a corporate employee has communicated with a lawyer regarding a transaction cannot cloak the employee's knowledge with immunity from disclosure. As one court has explained,

> [T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question. "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

City of Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962) (emphasis in original). *See also* Grant v.

the knowledge of an employee should be discoverable but instead whether it should be obtained through seizure of communications made in confidence to the corporation's counsel. Whether the privilege is defined narrowly or broadly, the only protected material is the actual communication made to or from an attorney.

For the same reasons, there is no basis for the court's assertion that the subject-matter test encourages "purposeful ignorance" among corporate managers. Here again, whatever the scope of the privilege, any information held by corporate officers or employees remains always subject to discovery, and a government agency or adversary may discover that knowledge whether or not it is reported internally to senior management. More important, the availability of the privilege's protection can only encourage management's efforts to obtain all of the facts it requires to take appropriate action. Without such assurances, management will be more fearful to ask, and employees more fearful to answer, questions that threaten possible civil or criminal liability. It is the absence of adequate protection under the privilege, and not its existence, that encourages "purposeful ignorance."

In fact, the circumstances of this case illustrate clearly that the court's suggestion is without basis. Upjohn authorized counsel's inquiries precisely in or-

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United States, 227 U.S. 74, 79 (1913); Balistrieri v. O'Farrell, 57 F.R.D. 567, 569 (E.D. Wis. 1972).

In this case, for example, the Service remains free to interrogate any or all of Upjohn's officers or employees it deems appropriate, and indeed it has already interviewed, in some instances more than once, at least 25 of those persons. App. 76a. In addition, it has already obtained extensive documents and records from Upjohn, and it may, if it elects, seek any other relevant materials it regards as appropriate to its purposes.

der to determine the facts regarding the reported foreign payments. It did so because it required informed legal advice in order to conform its conduct to applicable legal requirements, and in anticipation of litigation. As a result of counsel's inquiries, Upjohn was able to conform to policies adopted by the Securities and Exchange Commission, and to provide information to the Internal Revenue Service, its shareholders and the investing public. By any standard, the internal legal inquiries conducted by counsel on behalf of Upjohn advanced the public interest.

Nor does the fact that corporations sometimes select counsel to conduct legal inquiries, such as that involved here, suggest any untoward purpose. Management may wish such inquiries to be conducted by counsel to assure both the appearance and reality of objectivity.[33] Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications With Investigative Counsel,* 35 Bus. Law. 5, 9 (1979) [hereinafter cited as Block & Barton]. Moreover, a corporation's managers may lack the expertise to conduct an effective evaluation, which often depends heavily upon legal issues and legal standards. *Id.* Such inquiries demand a knowledge of legal requirements, as well as training in marshalling and evaluating complex facts, skills not always found even in senior management.

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[33] Government agencies have recognized that the participation of counsel may lend objectivity and impartiality to internal corporate inquiries. For example, the Securities and Exchange Commission has in a number of consent judgments compelled corporations to retain counsel for purposes of such inquiries regarding questionable foreign practices. *See, e.g.*, SEC v. Lockheed Aircraft Corp., [1976] Fed. Sec. L. Rep. (CCH) ¶ 95,509 (D.D.C. 1976).

In addition, the court of appeals sought to criticize the subject-matter test because it would assertedly bring within the privilege's protection communications by a client's servants and agents, rather than the client himself. Pet. App. 4a, 600 F.2d at 1226. The court evidently assumed for this purpose that only a corporation's central managers are analogous to an individual client. Even if it could be assumed that subordinate employees are not part of corporate counsel's "client," the court's criticism would be without merit. It is a "virtually . . . universal rule" in the state courts that the privilege encompasses communications even if they were made "by an agent or employee of the client, rather than by the client himself." Annot., 139 A.L.R. 1250, 1251 (1942). *Accord,* 8 Wigmore, *Evidence,* § 2317, at 618-19 (1961).[34]

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[34] *See also, e.g.,* Rodriguez v. North American Rockwell Corp., 28 Cal. App. 2d 441, 449, 104 Cal. Rptr. 678, 683 (1972); In re Petition of Delaware, 91 Mich. App. 399, 405, 283 N.W.2d 754, 757 (1979); Riddle Spring Realty Co. v. State, 107 N.H. 271, 274, 220 A.2d 751, 755 (1966); Ellingsgard v. Silver, 352 Mass. 34, 40, 233 N.E.2d 813, 817 (1967); In re Hyde, 149 Ohio St. 407, 413, 79 N.E.2d 224, 227 (1948); Brink v. Multnomah County, 224 Or. 507, 516-17, 356 P.2d 536, 540 (1960); Robertson v. Commonwealth, 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943); State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 580-81, 150 N.W.2d 387, 400 (1967); Arkansas National Bank v. Cleburne County Bank, 258 Ark. 329, 332, 525 S.W.2d 82, 86 (1975); Vacalis v. State, 204 Ala. 345, 346, 86 S. 92, 93 (1920); Stanley Works v. New Britain Redevelopment Agc'y, 155 Conn. 86, 94, 230 A.2d 9, 14 (1967); Wise v. Western Union Tel. Co., 178 A. 640, 644 (Del. Sup. Ct. 1935); Grand Union Co. v. Patrick, 247 S.2d 474, 475 (Fla. Dist. Ct. App. 1971); Fire Ass'n v. Fleming, 78 Ga. 733, 738, 3 S.E. 420, 422-23 (1887); Ill. Sup. Ct. R. 201; Leyner v. Leyner, 123 Iowa 185, 187, 98 N.W. 628, 629 (1904); Kan. R. Civ. Proc. 60-426(c); Brown v. St. Paul City Ry., 241 Minn. 15, 35, 62 N.W.2d 688, 700 (1954); Nev. Code Tit. 4 ch. 49 § .045 (1971); State v. Tapia, 113 N.J. Super. 322, 330, 273 A.2d

Although the court conceded this long-settled principle, Pet. App. 7a, n.11, 600 F.2d at 1227 n.11, it substituted, essentially without explanation, its own view as to how the law should instead have developed: "We believe, however, that this principle should be limited to agents who, at the client's request, communicate *facts known to the client.*" *Id.* (emphasis in original). The cases draw no such distinction, and no considerations of policy support it. To the contrary, appropriate deference to the states' paramount interests in this area demands that the federal privilege be interpreted in accordance with the common law as it has consistently developed, and not as the court below might now prefer.[35] In accordance with that law, the court's criticism of the subject-matter test is without merit.

Finally, the court of appeals expressed concern that the subject-matter test might result in an "undue limitation of evidence," by placing upon adverse parties the burden of interrogating employees rather than obtaining relevant information from the corporation's attorneys. Pet. App. 6a, 600 F.2d at 1227. The court was evidently troubled by the possible costs of discovery, particularly where the corporation's agents are resident abroad. Of course, it is always more convenient

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769, 773 (1971); Davenport Co. v. Pennsylvania R.R., 166 Pa. 480, 485, 31 A. 245, 246 (1895); S.D. Code Tit. 19 ch. 13 § 2 (1979), Evidence Rule 502(b)(1).

[35] While Federal Rule of Evidence 501 may contemplate that in rare instances federal courts might deviate from the established principles of the common law by reference to that part of the rule which permits the common law to be tempered by "reason and experience," such a deviation would, at the very least, require an examination of what the common law is, and a careful consideration of those factors which militate against its application. The court below made no effort to perform such an analysis.

for an adverse party to obtain an attorney's notes of communications with his client rather than to discover the information himself, and to formulate his own legal theories and conclusions on the basis of what he has learned. The issue here is, however, scarcely reducible to mere convenience. The attorney's role is to advise and represent his client, and not to serve as an engine of discovery for a government agency or opposing litigant. Where an attorney's client is an individual, such a shortcut is impermissible even if the client is abroad or otherwise unavailable. No considerations of law or policy suggest that a different rule should obtain merely because the client is a corporation.[36]

Both the court of appeals and respondents have, in their concern for the particular features of this single case, disregarded the farreaching implications of a grudging interpretation of the privilege's protection. Although the Service could readily obtain all of the facts it requires through its ordinary investigative tools, *infra* at 55-58, it would undoubtedly find it convenient instead to obtain the privileged materials at issue here. By so doing, however, it would seriously inhibit corporate efforts to conform to numerous legal

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[36] The court's concern that, in this case, certain corporate employees are resident in foreign countries is a particularly inappropriate basis upon which to decide this important issue of general application. Indeed, the court's emphasis on the burdens of discovery indicates serious confusion between the absolute attorney-client privilege and the qualified work-product rule, where, under Fed. R. Civ. P. 26(b)(3), genuine need, not mere convenience, may be a factor to be considered in deciding whether to accord protection. We show below that, even with respect to the work-product rule, the Service has not made the requisite showing of hardship to warrant elimination of work-production protection. *Infra* at 58-63.

and regulatory policies. Moreover, if the privilege's protection is denied in this case, corporate counsel can be expected to take stringent precautions in future cases. Communications between counsel and corporate employees will become guarded and incomplete, and counsel's files will in later cases offer little of assistance to the Service or any other adversary. The momentary advantages to the Service in this single case will be far outweighed by long-term injuries to the public interest.

Finally, it is important that the rule to be announced in this case will not define the scope of the attorney-client privilege for corporate clients alone. The district courts can be expected also to apply the rule when privilege questions arise involving other large organizations which, like corporations, are hierarchically structured—such as, for example, government agencies, labor unions and associations. *Cf. Mead Data Control, Inc.* v. *United States Department of the Air Force,* 566 F.2d 242, 253 n.24 (D.C. Cir. 1977). Accordingly, the adverse effects of adoption of the control-group test would be felt throughout the public and private sectors of society.

F. The Control-Group Test Is Inconsistent With Both the Purposes and the Effective Application of the Privilege.

The control-group test would achieve none of the important objectives of the attorney-client privilege. To the contrary, adoption of such a test would frequently deny corporations the assistance of informed legal counsel and inhibit salutary efforts at corporate self-regulation. In addition, the test is necessarily so vague and imprecise that its application would be unpredictable.

1. The Control-Group Test Denies Corporations the Assistance of Informed Counsel.

Adoption of the control-group test would substantially inhibit meaningful communications between corporate counsel and subordinate corporate employees. Without the protection of the attorney-client privilege, both counsel and the employees would be compelled to assume that any communications between them would be available for discovery by a government agency or private adversary. The employee, who may be fearful of personal liability, embarrassment or other consequences, will be reluctant to speak candidly. His fears may be confirmed by the attorney, who is likely to feel constrained to warn the employee of the possible risks of candor. In addition, the attorney, who will be uncomfortably aware that any information he elicits might later be used against the corporation or the employee by an adversary, will be hesitant to probe deeply. He may feel compelled to base his advice on incomplete information or conjecture. Because the attorney will be unable to learn "all that relates to the client's reason for seeking representation," he will be unable to perform effectively the "professional mission" with which he was entrusted. *Trammel* v. *United States,* 100 S.Ct. at 913.

Adoption of the control-group test would adversely affect corporate counsel's performance of his professional responsibilities in other important respects. When an attorney speaks in confidence to a client, he can describe candidly the advantages and possible risks of a contemplated course of action. In contrast, "failure to afford such protection will induce guarded or perhaps misleading advice." Miller, 49 Va. L. Rev. at 269. Many legal questions have no certain answers, and

at times a client may decide, perhaps against counsel's advice, to undertake an action involving potential legal risks. If the matter is later the subject of litigation or government inquiry, the attorney must put aside his earlier misgivings and argue forcefully for vindication of the client's position. The attorney's effectiveness as an advocate is significantly reduced, however, if those earlier misgivings can be the subject of discovery by his adversary, *id.* at 269-70, or, worse still, if the attorney himself is compelled to become a witness to explain or justify his earlier advice.[37]

In such circumstances, an attorney may hesitate to advise strongly against any action which he suspects that his client might ultimately decide to adopt. In the case of corporate clients, he may refrain from offering any advice at all to subordinate employees, or offer only guarded or imprecise advice. "The resultant caution with which the lawyer advises his client may mislead the client into thinking his proposed action is lawful when in fact it is not, or may not be. It may induce him to undertake a program from which he would have been dissuaded had he been clearly warned of the legal dangers." *Id.* at 270. As a result, the corporate client would be effectively deprived of the full benefits of his attorney's legal counsel. In addition, by

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[37] As we show below, there has long been a strong public policy, endorsed by this Court, against the appearance of attorneys as witnesses in their clients' causes. *Infra* at 53. *See generally* Hickman v. Taylor, 329 U.S. at 513; American Bar Ass'n, *Code of Professional Responsibility,* Ethical Consideration 5-9. Moreover, an attorney who is required to appear as a witness may be disqualified from participation as counsel for a client, thus depriving that client of his choice of counsel. *See* Comden v. Superior Court, 20 Cal. 3d 906, 145 Cal. Rptr. 9, 576 P.2d 971, *cert. denied,* 439 U.S. 981 (1978).

adopting an action against which his lawyer has been unable to recommend forcefully, the client may provoke needless litigation or cause unwarranted injuries to the interests of others. Thus, the interests of both the client and society would often be threatened because the attorney was not free to speak candidly in giving his counsel.

2. Adoption of the control-group test would inhibit voluntary corporate self-regulation.

Corporate counsel are, with respect to many important government regulatory programs, the primary agents of law enforcement. By advice, admonition and encouragement, corporate counsel supplement the enforcement efforts of overburdened government agencies, and contribute to the success of regulatory programs that might otherwise prove administratively impossible. An essential role of corporate counsel is to encourage and assist those voluntary efforts.[38] Adoption of the control-group test would severely impede the self-policing upon which much governmental regulation depends.

Corporate managements will, if the protection of the privilege is narrowly constricted, be less likely even to initiate vigorous efforts to investigate possible problems. Corporate managers are understandably hesitant to commence internal inquiries, the fruits of which may include costly litigation, damage to the

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[38] *E.g.*, Burnham, 24 Bus. Law. at 913-14; Shenefield at 74; The Role of Inside Counsel in Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Seventeenth Annual Corporate Counsel Institute (Oct. 9, 1979), *reprinted in* 196 Daily Report for Executives (BNA), October 9, 1979 at B-1.

corporation's business interests, and the exposure of corporate employees to embarrassment, liability or even physical danger.[39] *See, e.g., Dresser Industries, Inc.* v. *United States,* 596 F.2d 1231, 1234 (5th Cir. 1979), *cert. denied,* 100 S.Ct. 731 (1980); *SEC* v. *Lockheed Aircraft Corp.,* 404 F. Supp. 651, 652 (D.D.C. 1975). Under even the most favorable circumstances, management may believe that inquiries which threaten such consequences cannot serve the best interests of the corporation or its shareholders. If, in addition, counsel must warn management that communications made in connection with such inquiries cannot be held in confidence, but instead will be freely available to litigants and government agencies for use against the corporation, corporate managers may feel themselves compelled to assume a posture of "purposeful ignorance." Pet. App. 6a; 600 F.2d at 1227.[40]

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[39] The Third Circuit has dismissed this argument by suggesting that corporate managers have "little choice" whether to initiate internal inquiries because "the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential." In re Grand Jury Investigation (Sun Co.), 599 F.2d at 1237. Attorneys who deal with corporate clients on a daily basis disagree strongly with this conjecture. *See, e.g.,* Committee on the Federal Courts, New York County Lawyers Ass'n, Report on the Proposed Rules of Evidence, art. V, 7-8 (April 1970), *quoted in* 2 Weinstein & Berger, ¶ 503[01], at 503-12 n.1.

[40] The control group test has also been criticized for failing to recognize that an individual client acts both as a provider of information and as a decision-maker vis-a-vis the attorney. Limiting the corporate privilege to those individuals who are decision-makers ignores the necessity for the client to provide information to his attorney in confidence. *See, e.g.,* Note, 69 Mich. L. Rev. at 374.

The control-group test would also increase the unwillingness of subordinate corporate employees to cooperate with internal legal investigations. As we have observed above, counsel will be unable to assure such employees that their communications will be held in confidence. Aware that their statements may ultimately fall into the hands of an enforcement agency or opposing litigant, the employees may rightfully fear that cooperation will result in substantially enhanced risks of personal civil or criminal liability. *Corporate Crime,* 92 Harv. L. Rev. at 1259-76; Recent Decisions, *Corporations: Attorney-Client Privilege,* 47 Geo. Wash. L. Rev. 413, 424 n.81 (1979). Without the protection of the privilege, employees will be reluctant to answer questions relating to their compliance with legal and regulatory requirements.[41]

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[41] It has been suggested that affording the privilege to the corporation might not alleviate this concern because the employees would have no privilege of their own, and hence could not prevent the corporation from disclosing the information. *See, e.g.,* In re Grand Jury Investigation (Sun Co.), 599 F.2d at 1236; Jarvis, Inc. v. American Tel. & Tel. Co., 84 F.R.D. 286, 290, 292 (D. Colo. 1979). This argument ignores reality. A corporation has an interest in keeping open the channels of communication with its employees, and has good reason to keep information confidential which might be detrimental to an employee. If some employees suffer as a result of statements made to the corporation's attorneys, other employees will become reluctant to speak. Note, *The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive,* 55 Ind. L.J. 407, 408 (1980). Accordingly, it is not surprising that there are few cases where the corporation has waived the privilege vis-a-vis the employee. *Id.* at 408 & n.8.

Moreover, regardless of which test is applied to the privilege, the corporation must always speak through agents who may ultimately be jointly liable with the corporation. *See id.* at 409-11. The solution to this problem is not, as suggested by the Third Circuit, to narrow the corporation's privilege, but rather to broaden the employees' privilege in a manner consistent with these concerns. A proposal to that effect is set forth *id.* at 416-21.

Finally, adoption of the control-group test will impose other substantial constraints upon corporate counsel's efforts to assist corporate self-regulation. When it may reasonably be anticipated that the privilege will be available—as it was expected to be in this case—the attorney's principal concerns are accuracy and completeness. His purpose is to determine the relevant facts so that he may reliably advise the client whether wrongdoing has occurred or is threatened, and whether steps should be taken to mitigate or correct the situation. If, however, the attorney is aware that the information he receives in the course of his duties may become publicly available—and may perhaps fall into the hands of an adversary who will seek to exploit it to the detriment of his client—his concerns may become quite different. For "fear of what may eventually be released to the other side," [42] he will be obliged to remain constantly on guard to create a favorable record and thereby to minimize the potential harm to his client's interests.

3. The Control-Group Test Is Uncertain and Unpredictable in Its Application.

A privilege, if it is effectively to serve the policies for which it is intended, must be applied in a uniform and predictable fashion. If it is not, neither counsel nor clients can rely upon its protection, and it cannot encourage the communications it was designed to promote. *Fisher* v. *United States,* 425 U.S. at 403; *United States* v. *Buckley,* 586 F.2d 498, 502-03 (5th Cir. 1978),

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[42] Comment, *The Privileged Few: The Attorney-Client Privilege As Applied to Corporations,* 20 U.C.L.A. L. Rev. 288, 301 (1972). *See also* Block & Barton, 35 Bus. Law. at 6.

cert. denied, 440 U.S. 982 (1979). *See also* 2 Weinstein & Berger, ¶ 503(b)[04], at 503-44.

The control-group test articulated by the court of appeals plainly does not satisfy this important requirement. The court defined the "control group" as "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given." Pet. App. 5a, 600 F.2d at 1226.[43] Such a definition suggests more questions than it resolves, and effectively guarantees that the scope of application of the privilege will remain uncertain and unpredictable. For example, what constitutes a "substantial role" in "deciding and directing" the corporation's response to legal advice? What, if any, difference is there between "deciding" on a response and "directing" it? If the control group "usually" consists of "top" managers, what are the exceptions? What managers are "top?" When dealing with a wholly or partially controlled subsidiary, is the relevant control group that of the parent corporation or that of the subsidiary?

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[43] The definition offered by Judge Kirkpatrick when he first announced the control-group test was different at least in form. He permitted the application of the privilege only if:

> the employee making the communication, of whatever rank he may be, is in a position to control or even take a substantial part in a decision about any action which the corporation may take upon the advice of an attorney, or if he is an authorized member of a body or group which has that authority.

City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. at 485. The questions raised by, and the ambiguities implicit in, that definition, although different in part from those of the definition adopted below, are no less serious and fundamental.

The ambiguity of the court's definition is not the result of any lack of care. It reflects instead the vagueness of the control group concept and its unworkability in the context of the modern corporation—particularly a large, multinational corporation with different areas of responsibility diffused among many individuals at various levels in the corporate structure. It is undoubtedly true that central corporate managers have ultimate responsibility for establishing corporate policy in light of counsel's advice, but many aspects of the development and implementation of policy are commonly left largely in the hands of middle and lower-echelon managers. *Supra* at 16-18. In any particular case, responsibility for a decision may be shared among many different levels and elements of the corporate structure, with the discretion afforded to each of them varying significantly with the issue in question and the size and structure of the corporation.[44] In these circumstances, corporate counsel will often be unable to predict who ultimately might be held to have taken a sufficiently "substantial part" in a decisionmaking process for inclusion in the "control group."

The cases which have applied the control-group test illustrate vividly both the test's ambiguities and its dependence upon detailed factual findings peculiar to each specific case. For example, in *Hogan* v. *Zletz,* 43 F.R.D. 308, 315-16 (N.D. Okla. 1967), *aff'd in part sub nom. Natta* v. *Hogan,* 392 F.2d 686 (10th Cir. 1968), the court held that numerous corporate employees were members of the control group, including not only the managers and assistant managers of the company's

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[44] *E.g.,* Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege,* 12 B.C. Indus. & Com. L. Rev. 873, 876 (1971).

patent division and research and development department, but also all of the members of the company's patent committee. In *Garrison* v. *General Motors Corp.,* 213 F. Supp. 515, 518 (S.D. Cal. 1963), the court held that all officers, directors and department heads, as well as a department head's assistant and the chief engineer, were in the control group. On the other hand, the court excluded a senior project manager and the assistant chief engineer. *See also, Herbert* v. *Lando,* 73 F.R.D. 387, 397-400 (S.D.N.Y.) (network vice president and executive producer of new program both held within control group), *remanded on other grounds,* 568 F.2d 974 (2d Cir. 1977), *rev'd on other grounds,* 441 U.S. 153 (1979).

Other district courts purporting to apply the same test have reached strikingly different results. In *Congoleum Industries, Inc.* v. *GAF Corp.,* 49 F.R.D. 82, 82-85 (E.D. Pa. 1969), *aff'd,* 478 F.2d 1398 (3d Cir. 1973), the court found that only the divisional and corporate vice presidents were entitled to control-group status, and excluded two directors of research and one vice president for production and research. In *Duplan Corp.* v. *Deering Milliken Inc.,* 397 F. Supp. 1146, 1165-67 (D.S.C. 1974), *aff'd on other grounds,* 540 F.2d 1215 (4th Cir. 1976), the court, applying an amalgamation of tests, limited the control group to the highest officers and directors, excluding such senior members of management as vice-presidents and directors of research.

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Adoption by this Court of the subject-matter test will encourage candid communications between counsel and all corporate employees with information relevant to the professional responsibilities counsel has been

assigned to perform, and thus assure corporations the opportunity, similar to that now guaranteed individuals, to obtain informed legal assistance. In addition, it will facilitate the voluntary efforts of corporations to conform their conduct to legal and regulatory requirements. Such a test will also accord with well-settled state policies and provide both courts and corporate counsel with a relatively simple and objective standard for application of the privilege. In contrast, the control-group test would deny corporations informed legal assistance, inhibit corporate self-regulation, and introduce uncertainty and unpredictability in the privilege's application.

II.

THE WORK-PRODUCT RULE IS APPLICABLE HERE AND PROTECTS FROM DISCLOSURE THE MATERIALS PREPARED BY AND FOR COUNSEL IN CONTEMPLATION OF LITIGATION

The second question presented is whether the lawyers' interview notes and the questionnaire responses demanded by the summons are protected against compulsory disclosure under *Hickman* v. *Taylor,* 329 U.S. 495 (1947), and Fed. R. Civ. P. 26(b)(3). The court of appeals did not hold that these materials do not constitute attorney work-product. Nor did it consider whether work-product protection was overriden by any showing of necessity. Instead, in a terse footnote, it declared that attorney work-product materials are entitled to no protection in responding to a summons issued by the Service under 26 U.S.C. § 7602.[45]

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[45] Unlike its ruling on attorney-client privilege, discussed above, the court's holding as to the work-product rule applies to individual taxpayers as well as to corporations.

A.

Neither the Statutes Authorizing nor the Policies Served by Issuance of a Summons Warrants Denial of Work-Product Protection.

The question presented is ultimately one of statutory interpretation:[46] Whether, despite the important public policies served by the work-product rule, Congress intended that the rule's protection should not be applicable to summonses issued by the Service. At the outset, it is significant that nothing in the language of Section 7602, or any other provision of the Internal Revenue Code, suggests that the work-product rule might not be applicable to such summonses. Section 7602 and the ancillary sections that govern enforcement of summonses are entirely silent on the matter.[47] Nothing in the legislative history of those sections suggests that Congress ever supposed that it might be eliminating the protections afforded by the work-product rule.[48] Nor does Federal Rule of Civil Procedure

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[46] *See* Donaldson v. United States, 400 U.S. 517, 522 (1971); United States v. Euge, 100 S.Ct. 874, 877-78 (1980). It should be observed, however, that important constitutionally-protected interests may indirectly be implicated by any decision here, including privacy and the effective assistance of counsel. *See infra* at n.48, 57 nn. 68 & 69; Fisher v. United States, 425 U.S. at 414-15 (Brennan, J., concurring); Dalia v. United States, 441 U.S. 238, 263 (1979) (Stevens, J., dissenting). These substantial constitutional interests serve to magnify the importance of the longstanding policies the rule is designed to serve. *Infra* at 49-55.

[47] The Service's basic authority to issue such summonses is contained in Section 7602, but other provisions of Subchapter A of Chapter 78 of Title 26 govern such ancillary matters as enforcement, time and place of examination, service and third-party summonses. None of those provisions purports to restrict in any way the application of the work-product rule.

[48] Congress amended the Service's summons authority in 1954, several years after the decision in *Hickman* v. *Taylor*, but it did

81(a)(3), which renders those rules applicable to summons enforcement proceedings, purport to limit in any way the relevance of the work-product principle embodied in Rule 26(b)(3).[49]

Nor has this Court ever suggested that the work-product rule is irrelevant to a summons issued under Section 7602. To the contrary, the Court appeared to assume in at least two cases that the rule is applicable to such summonses. In *Reisman* v. *Caplin,* 375 U.S. 440 (1964), a taxpayer's attorney sought to prevent an accountant from producing materials prepared under the attorney's direction. This Court denied declaratory and injunctive relief, on the ground that there was an adequate remedy at law. It emphasized that an action in the district court to enforce the summons would afford "complete protection," *id.* at 446, and made clear that "any appropriate ground" may be asserted in such an action to defeat a summons. *Id.* at

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not intend to change the scope or interpretation of that authority. H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4017; S. Rep. No. 1622, 83d Cong., 2d Sess. (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4621. *See also* United States v. Euge, 100 S.Ct. at 881 n.12. In subsequent amendments to related provisions, Congress has shown a strong concern to prevent infringements by the Service of taxpayers' privacy interests. H.R. Rep. No. 94-658, 94th Cong, 2d Sess. 307 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 3203; United States v. Exxon Co., U.S.A., 450 F. Supp. 472, 476 (D. Md. 1978). Such concern is scarcely consistent with any intention to abolish entirely the protection of the work-product rule in connection with Section 7602.

[49] Although the specific provisions of the Federal Rules may not inflexibly apply in summons enforcement proceedings, Donaldson v. United States, 400 U.S. at 528, Rule 81 provides in substance that those rules, including the work-product provisions of Rule 26(b)(3), should apply, absent good reasons to the contrary.

449. Although the Court did not specifically list the work-product rule as such a ground,[50] it would have been an empty gesture to remit the parties to an action in the district court if the work-product materials which were the action's principal subject could under no circumstances be protected.

Similarly, the Court appeared to assume in *Donaldson* v. *United States,* 400 U.S. 517 (1971), that the work-product rule would be applicable in an action to enforce an IRS summons. In assessing a taxpayer's claim to intervene as of right in a proceeding to enforce a third-party summons, the Court carefully emphasized that the documents in question were "routine" business records and not his attorney's work product. *Id.* at 530. On this basis, it held that the taxpayer did not have the requisite interest to intervene as of right. By implication, a taxpayer would have the requisite interest in documents that were the work product of his attorney, and presumably would be entitled to intervene precisely in order to enforce the protection of the work-product rule.[51]

Prior to the decision of the court below, the only suggestion that the work-product rule might not apply to a summons issued under Section 7602 was made in *United States* v. *McKay,* 372 F.2d 174, 176 (5th Cir. 1967). Even there, the court did not hold the rule inapplicable; instead, it merely expressed doubt based

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[50] It did, however, identify the closely-related attorney-client privilege as one such ground. 375 U.S. at 449.

[51] More recently, partly in an effort to buttress taxpayers' privacy rights against needless infringement by the Service, Congress has created statutory rights of intervention in proceedings to enforce certain third-party summonses issued by the Service. *Supra* at 45 n.48; *infra* at 57 n.68.

on the belief that the Service's investigations are analogous to grand jury proceedings, and that the rule is inapplicable to such proceedings.[52] Since that expression of uncertainty in 1967, there have been significant developments. First, in a series of cases it has been held that the work-product rule is applicable in grand jury proceedings.[53] To the extent that the Service's investigatory powers are analogous to the inquisitorial powers of a grand jury,[54] the analogy now demands reversal of the court of appeals' conclusion. Second, at least four courts have rejected the expression of doubt in *McKay*. *United States* v. *Brown*, 478 F.2d 1038, 1041 (7th Cir. 1973); *United States* v. *Amerada Hess Corp.*, 1980-1 U.S. Tax Cas. (CCH) ¶ 9160, at 83,177 (3d Cir. 1980); *United States* v. *Lipshy*, 1979-2

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[52] The uncertainty expressed in *McKay* was mentioned in passing in United States v. Cote, 326 F. Supp. 444, 450 (D. Minn. 1971), *aff'd on other grounds*, 456 F.2d 142 (8th Cir. 1972). The issue was not considered by the court of appeals in *Cote*.

[53] In re Grand Jury Investigation (Sun Co.), 599 F.2d at 1229; In re Grand Jury Subpoena Dated December 19, 1978, 599 F.2d 504, 509 (2d Cir. 1979); Velsicol Chemical Corp. v. Parsons, 561 F.2d 671, 676 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 842 (8th Cir. 1973); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 946-47 (E.D. Pa. 1976); Matter of Rosenbaum, 401 F. Supp. 807, 808 (S.D.N.Y. 1975); United States v. Mitchell, 372 F. Supp. 1239, 1245 (S.D.N.Y. 1973), *appeal dismissed sub nom.* Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973); In re Terkeltoub, 256 F. Supp. 683, 685 (S.D.N.Y. 1966). *See also* United States v. Nobles, 422 U.S. 225, 247 n.6 (1975) (White, J., concurring).

[54] The Government accepted them as analogous for purposes of its brief in this case before the court of appeals. At 28. *See also* United States v. Powell, 379 U.S. 48, 57 (1964); United States v. Bisceglia, 420 U.S. 141, 147-48 (1975); United States v. Amerada Hess Corp., 1980-1 U.S. Tax Cas. (CCH) ¶ 9160 (3d Cir. 1980).

U.S. Tax Cas. (CCH) ¶ 9628, at 88,280 (N.D. Tex. 1979); *Groh* v. *Decker,* 1972-1 U.S. Tax Cas. (CCH) ¶ 9410, at 84,410 (W.D. Mich. 1971), *appeal vacated and case remanded,* 1973-1 U.S. Tax Cas. (CCH) ¶ 9401 (6th Cir. 1973).

In short, the court of appeals' unexplained conclusion stands virtually alone. Nothing in the language or history of the statute justifies such a result. Apart from one tentative dictum, now superseded by subsequent events, nothing in the cases supports it. Four courts have unequivocally rejected it, and at least two decisions of this Court appear inconsistent with it.

1. The Important Public Policies Served by the Work-Product Rule Apply to a Service Summons.

In *Hickman* v. *Taylor,* 329 U.S. 495 (1947), this Court emphasized that the protection of attorney work product against compulsory disclosure is "essential" for the vindication of important public policies, particularly the "public policy underlying the orderly prosecution and defense of legal claims." *Id.* at 510. More important, it recognized that without suitable work-product protection both clients and the cause of justice "would be poorly served." *Id.*[55]

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[55] The Court identified several reasons why the protection of attorneys' work-product is "essential." Adequate preparation for possible litigation demands that lawyers be afforded privacy to assemble all of the pertinent facts, sift relevant from irrelevant information, and formulate legal theories and strategies. 329 U.S. at 511. Without such privacy, much that is now written would be left unrecorded, and an attorney's thoughts, "heretofore inviolate, would not be his own." *Id.* The Court feared that the disclosure of work-product materials would stimulate "[i]nefficiency, unfairness and sharp practices." *Id.*

The Court foresaw especially severe problems if an attorney's notes regarding oral statements made to him by potential witnesses, such as the attorneys' interview notes at issue here, were subject to disclosure. The difficulties which would be caused by compulsory production of such materials are so great, and the corresponding interest in privacy so strong, that "[n]o legitimate purpose" could be served by their disclosure. *Id.* at 512-13. Even apart from the "grave dangers of inaccuracy and untrustworthiness" that would be created, the availability of such materials would make the attorney "much less an officer of the court and much more an ordinary witness." *Id.* at 513. Lawyers would frequently be compelled to testify in their clients' causes, and the "standards of the profession would thereby suffer." *Id.* At least in the situation before it, the Court was unable to imagine any possible showing of necessity that could ever justify the disclosure of such materials. *Id.* at 512.[56]

The decision in *Hickman* v. *Taylor* is sometimes regarded as the origin of the work-product rule, but in fact the policies served by the rule were recognized substantially earlier. Well before *Hickman,* both American and English courts held that attorneys' notes and other materials prepared in anticipation of possible litigation generally were not subject to disclosure. 4 Moore, *Federal Practice* ¶¶ 26.63[2], [3] (2d ed. 1979). They did so for several interrelated reasons: For example, such materials were not considered evidence; parties were not thought to be entitled to pry

[56] Thirty years later, Mr. Justice White, joined by Mr. Justice Rehnquist, observed that such mental impressions are "almost never evidence" and that out-of-court statements are generally inadmissible hearsay. United States v. Nobles, 422 U.S. at 245 n.4 (White, J., concurring).

into their opponents' strategies and preparations for litigation; or the materials were thought to be encompassed by the attorney-client privilege. *Id.; Hickman* v. *Taylor,* 329 U.S. at 510 n.9; *United States* v. *Nobles,* 422 U.S. at 243 n.2 (White, J., concurring). In short, the work-product rule reflects a long-standing policy on both sides of the Atlantic that, to assure the orderly and effective operation of the adversary system, attorneys' work product should be protected.

Almost thirty years after *Hickman,* the Court reaffirmed the urgency of the public policies served by the work-product rule. In *United States* v. *Nobles,* the Court held that the rule applies to criminal as well as civil litigation. 422 U.S. at 236. In so doing, the Court emphasized that the rule performs a "vital" role in all litigation, to "assure the thorough preparation and presentation of each side of the case." *Id.* at 238 (footnote omitted). The Court stated that the rule is "intensely practical," grounded in the "realities of litigation in our adversary system." *Id.* The "strong" policies served by the rule, *id.* at 236-37, are ultimately rooted in society's interest in the fair and effective operation of our system of justice. *Id.* at 238.

The importance of the public policies served by the work-product rule is illustrated vividly by this case. If it had been clear that work-product materials would be available for scrutiny by the Service, counsel for Upjohn would likely have conducted their voluntary investigation of questionable foreign payments quite differently. For example, counsel might have limited the number of employees they elected to interview; they might have conducted interviews but not prepared notes of their impressions and conclusions; or they might have made only selective notes, in which they did not record information or impressions that might

later be construed as harmful to Upjohn or its employees.

If any of these expedients had been adopted by Upjohn's lawyers, the public interest plainly would not have been served. Upjohn itself would have enjoyed substantially less adequate preparation for anticipated litigation. More important, the regulatory policies adopted by the Securities and Exchange Commission and other agencies with respect to questionable foreign practices might have been less effectively enforced. Upjohn and numerous other companies would have been discouraged from voluntary programs of self-regulation which are essential for effective implementation of those policies.[57] Investors and the public might have received less complete information. Precisely as this Court predicted, the result would have been "demoralizing" to the lawyers, and, far more important, a serious disservice to their clients and the cause of justice. *Hickman* v. *Taylor*, 329 U.S. at 511.

In addition, if any of the issues foreseen by Mr. Thomas ripens into litigation, whether with the Service

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[57] *See, e.g.*, The Role of Inside Counsel in Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Seventeenth Annual Corporate Counsel Institute (Oct. 9, 1979), *reprinted in* 196 Daily Report for Executives (BNA), October 9, 1979, at B-1; Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Fifth Annual Securities Regulation Institute (Jan. 18, 1978), *summary in* 12 Daily Report for Executives (BNA), January 18, 1978, at A-13; Address by Stanley Sporkin, Securities and Exchange Commission, before the Stamford, Conn. Area Commerce and Industry Ass'n (Mar. 15, 1977). *See also* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. at 1164; Lorne, *The Corporate and Securities Adviser, The Public Interest and Professional Ethics*, 76 Mich. L. Rev. 423 (1978).

or with others, Upjohn's attorneys may, if their interview notes are disclosed, be compelled to testify in support or explanation of those notes. Such a result would violate the long-standing policy against lawyers serving as witnesses in their clients' causes. Counsel would be placed in the "unseemly and ineffective position" of arguing their own credibility.[58] *See id.* at 513; *United States* v. *Nobles,* 422 U.S. at 252-53 (White, J., concurring). Precisely as this Court feared, "[t]he standards of the profession would thereby suffer." *Hickman* v. *Taylor,* 329 U.S. at 513.

The strength of the policies served by the work-product rule is confirmed by the rule's unquestioned application in closely related situations. If, for example, the Department of Justice were to continue this investigation on behalf of the Service through a grand jury, the work-product rule would be applicable.[59] Alternatively, if the Department of Justice were to initiate civil or criminal litigation against Upjohn on behalf of the Service in the district courts, the Federal Rules of Civil or Criminal Procedure would govern, and the work product of Upjohn's counsel would be assured a substantial measure of protection. Fed. R. Civ. P. 26(b)(3); Fed. R. Crim. P. 16(b)(2).

The Service seeks here far greater rights to seize materials under Section 7602 than are available through

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[58] Ethical Consideration 5-9 of the American Bar Association's Code of Professional Responsibility (1978) provides in relevant part that:

> An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

[59] *Supra* at 48 & n.53.

a grand jury's inquisitorial powers or during civil or criminal litigation. There is no policy or other justification for such disparate results. Moreover, such an anomaly would encourage the Service to avoid the limitations that have been imposed on civil and criminal discovery by extending its investigations beyond the time that a decision to litigate is appropriate. This Court has already warned against such efforts in a related context. *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).[60]

The rejection of work-product protection in connection with summonses issued under Section 7602 would have serious adverse consequences extending far beyond the timing of the Service's prosecutorial recommendations. The Service's authority under Section 7602 has been described by this Court as analogous to the summons authority of other federal agencies, *United States* v. *Powell*, 379 U.S. at 57; *United States* v. *Bisceglia*, 420 U.S. at 147-48, and it must be anticipated that any decision here would be applied to summonses issued by other agencies. In addition, virtually any controversy may ultimately have federal tax consequences, or consequences under a federal regulatory statute containing analogous summons provisions.[61] As a result, rejection of the work-product rule will compel counsel in a broad range of disputes, many of which will not be initially or primarily tax-related, to pre-

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[60] "We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for prosecution." 437 U.S. at 316-17.

[61] As Mr. Justice Stewart has observed, "[o]ur economy is 'tax relevant' in almost every detail." United States v. Bisceglia, 420 U.S. at 154 (Stewart, J., dissenting).

pare for anticipated litigation on the basis that at some stage of the controversy their work product may be denied protection.

The important policies served by the work-product rule readily explain why nothing in the statute or its legislative history intimates any intention by Congress to prevent the rule's application to a summons issued under Section 7602. Such summonses are issued in support of investigations that may easily terminate in civil or criminal litigation, and tax-related litigation cannot meaningfully be distinguished for this purpose from other anticipated litigation. The same "strong" policy favoring the orderly prosecution and defense of claims is applicable,[62] the same risks of "unfairness" and "sharp practices" would arise from rejection of work-product protection,[63] and the same "realities of litigation" exist.[64]

2. The Service Has Adequate Investigatory Methods for the Performance of Its Responsibilities Without Access to Work-Product Materials.

It cannot persuasively be argued that access to attorneys' work product is "necessary"[65] for the Service's performance of its responsibilities for the enforcement and administration of the federal tax laws. To the contrary, Congress has provided the Service with broad powers that are entirely adequate to obtain any pertinent information it may require. Section 7602

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[62] United States v. Nobles, 422 U.S. at 236-37.

[63] Hickman v. Taylor, 329 U.S. at 511.

[64] United States v. Nobles, 422 U.S. at 238.

[65] United States v. Euge, 100 S.Ct. at 878.

authorizes the Secretary of the Treasury, or his delegate, for

> the purpose of ascertaining the correctness of any return . . . determining the liability of any person for any internal revenue tax . . . or collecting any such liability . . . [t]o summon the person liable for tax . . . or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person the Secretary may deem proper, to appear . . . and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . .

Such summonses may be addressed to third-party witnesses, as well as the taxpayer and his agents.[66] If a witness refuses to appear or testify, the Service may obtain prompt enforcement of the summons in the district courts. 26 U.S.C. §§ 7402(b), 7604.[67] Other provisions of the Internal Revenue Code compel taxpayers to maintain such books and records as may be necessary for the Service to determine tax liability. For example, 26 U.S.C. § 964(c) and its accompanying regulations require a taxpayer, such as Upjohn, which is a shareholder of controlled foreign corporations, such as several of Upjohn's subsidiaries involved in the Service's investigation, to maintain (and even to translate into English) such records and accounts regarding controlled foreign corporations as the Service may prescribe. These and other statutory provisions assure

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[66] *See, e.g.*, United States v. Bisceglia, 420 U.S. at 148-50. *See also* 26 U.S.C. § 7609.

[67] Failure to appear or produce records also may be punished, in appropriate circumstances, by fine or imprisonment. 26 U.S.C. §§ 7210, 7604(b). *See* Reisman v. Caplin, 375 U.S. at 446-49.

the Service access to a broad range of relevant documents and information.

In addition, the courts have acted vigorously to assure the effectiveness of the investigatory powers granted by Congress. This Court has held that a taxpayer may not collaterally attack a summons, *Reisman* v. *Caplin,* 375 U.S. at 448-49, and that he may not intervene as of right in an action to enforce a summons against a third party. *Donaldson* v. *United States,* 400 U.S. at 527-30.[68] The Service need not show probable cause to believe that fraud has been committed in order to conduct a second examination of a taxpayer's books, notwithstanding the limiting provisions of 26 U.S.C. § 7605(b), *United States* v. *Powell,* 379 U.S. at 52-57, and the Service may use its summons power in aid of criminal as well as civil tax investigations, so long as no recommendation to the Department of Justice for criminal prosecution has been made. *United States* v. *LaSalle National Bank,* 437 U.S. at 318. The Court has sustained the validity of John Doe summonses, *United States* v. *Bisceglia,* 420 U.S. at 148-50,[69] and only this year the Court upheld the

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[68] The result in *Donaldson* was modified by Congress in 1976 by the addition to the Code of 26 U.S.C. § 7609, which provides taxpayers certain rights of notice and intervention in connection with third-party summonses. In so doing, Congress emphasized its concern regarding undue invasions of privacy by the Service. *E.g.*, H.R. Rep. No. 94-658, *supra*, at 307. *See generally* Kenderdine, *The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses,* 64 Minn. L. Rev. 73, 81-85 (1979).

[69] Such John Doe summonses are now, however, the subject of modified requirements generally set forth in 26 U.S.C. § 7609(f). An important reason for Congress' addition of these provisions in 1976 was its concern regarding needless invasions of privacy interests. *See* materials cited in note 68, *supra.*

Service's right to require a taxpayer to execute handwriting exemplars. *United States* v. *Euge,* 100 S.Ct. at 877.

The formidable armory of investigatory weapons given to the Service by Congress, and vigorously enforced by this and other courts, leaves no room for any persuasive claim that it is also "necessary"[70] for the Service to be afforded access to the work product of Upjohn's counsel. In this case, for example, we show that the Service had access, or could readily have obtained access, to all of the testimony and documentary materials that it could conceivably have required for its investigation. There was no need for it instead to seek to ride piggyback on the materials prepared by or for Upjohn's counsel in contemplation of possible litigation. In Justice Jackson's words, the Service should not perform its functions on "wits borrowed from the adversary." *Hickman* v. *Taylor,* 329 U.S. at 516 (Jackson, J., concurring).

B.

Work-Product Protection Was Not Overcome in This Case by Any Showing of Necessity.

It is not contested that the interview notes[71] and questionnaire responses sought by the summons con-

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[70] United States v. Euge, 100 S.Ct. at 878.

[71] At the hearing before the Magistrate, Mr. Thomas described the contents of his notes in the following terms:

> My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things

stitute the work product of Upjohn's counsel. Precisely as *Hickman* v. *Taylor* provided, and Rule 26(b)(3) now requires, all of the materials were prepared by or for counsel "in anticipation of litigation." From the outset, Mr. Thomas recognized that questionable foreign payments give rise to a wide variety of legal problems, any or all of which may stimulate litigation.[72] His fears were by no means groundless. Such payments have frequently led to civil or criminal litigation.[73] Indeed, the Third Circuit has emphasized that in such

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that I needed to find elsewhere. They were more than just a verbatim report of my conversation with the—a report of my conversation in the interviews.

App. 93a.

[72] Among other matters, Mr. Thomas was concerned about possible litigation involving compliance with the securities laws, currency restrictions, federal tax laws or the laws of various foreign jurisdictions. *See, e.g.*, App. 123a-124a.

[73] *See, e.g.*, Abbey v. Control Data Corp., 603 F.2d 724 (8th Cir. 1979), *cert. denied*, 100 S.Ct. 670 (1980); SEC v. Lockheed Aircraft Corp., [1976] Fed. Sec. L. Rep. (CCH) ¶ 95,509 (D.D.C. 1976); Gall v. Exxon Corp., 418 F. Supp. 508 (S.D.N.Y. 1976); SEC v. International Telephone & Telegraph Corp., [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,948 (D.D.C. 1979); Rosengarten v. International Telephone & Telegraph Corp., 466 F. Supp. 817 (S.D.N.Y. 1979); SEC v. International Systems & Controls Corp., [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,922 (D.D.C. 1979).

In this case, after the decision of the court of appeals, petitioners were informed by letter dated September 17, 1979, that the Service had made a recommendation to the Department of Justice regarding a criminal prosecution. The nature of that recommendation and the circumstances which led to it are not part of the record before this Court. The Solicitor General and petitioners agree that any contentions as to the impact of that recommendation upon the summons challenged in this case, including any based upon the decision of this Court in United States v. LaSalle National Bank, 437 U.S. 298 (1978), may be considered by, and should appropriately be addressed initially to, the district court in connection with any remand of the case by this Court.

situations litigation is "almost inevitable." *In re Grand Jury Investigation (Sun Co.),* 599 F.2d at 1229. *See also In re Grand Jury Subpoena Dated December 19, 1978,* 599 F.2d at 511. The interview notes and questionnaire responses at issue here were parts of Mr. Thomas' efforts to prepare for such anticipated litigation.

Notes and memoranda prepared by attorneys in connection with their interviews of potential witnesses have repeatedly been held to constitute work product. *E.g., Hickman* v. *Taylor,* 329 U.S. at 512-13; *International Business Machines Corp.* v. *Edelstein,* 526 F.2d 37, 41 (2d Cir. 1975); *In re Grand Jury Proceedings (Duffy),* 473 F.2d at 848. In fact, such materials have, to the extent that they reflect an attorney's "mental impressions, conclusions, opinions, or legal theories," consistently been afforded absolute immunity from disclosure. Fed. R. Civ. P. 26(b)(3);[74] *Hickman* v. *Taylor,* 329 U.S. at 512-13. At least since *Hickman,* courts have recognized that the disclosure of such materials would create special risks of inaccuracy and sharp practices, as well as compelling lawyers frequently to testify in their clients' causes. *See also United States* v. *Leggett & Platt, Inc.,* 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,* 509 F.2d 730, 735-36 (4th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975).

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[74] Although Rule 26(b)(3) permits the disclosure of various trial preparation materials upon a suitable showing of need and hardship, it unequivocally instructs the district courts to "protect against disclosure" materials containing "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative . . . ."

The second category of materials demanded by the summons, the responses to the confidential questionnaire prepared by Upjohn's attorneys, also constitute counsel's work product. *See, e.g., United States* v. *American Optical Co.,* 37 F.R.D. 233, 236-37 (E.D. Wis. 1965); *United States* v. *Aluminum Co. of America,* 34 F.R.D. 241, 243 (E.D. Mo. 1963), *aff'd per curiam on other grounds,* 382 U.S. 12 (1965).

The court of appeals did not consider whether the protection of the work-product rule was overcome in this case by any showing of necessity. Although the district court concluded, on the basis of the Magistrate's recommendation, that such a showing had been made, that conclusion is clearly erroneous. The Service had available to it a formidable arsenal of methods, which together were entirely adequate for purposes of its investigation. If the Service wished additional information, it had only to utilize those methods in accordance with Congress' intentions; there was no need instead to resort to the work product of Upjohn's counsel.

The Magistrate's recommendation was based largely upon Upjohn's objection, on grounds of relevancy, to questions regarding payments which could not conceivably have affected its United States tax liability. App. 190a-91a. That recommendation is, however, largely undermined by the fact that the Service itself sustained petitioners' position on this point in a ruling issued during the course of the investigation.[75] In any case, the appropriate method for the Service to adopt in challenging Upjohn's objections would have been to issue summonses for the witness' testimony, and there-

[75] Revenue Ruling 77-442, 1977-2 C.B. 264.

after to petition the district court for enforcement. The Service's failure to adhere to a direct method of resolving the relevancy issue, coupled with its subsequent acceptance of the position taken by petitioners, completely undercuts the Magistrate's conclusion, adopted by the district court, that the work-product privilege had been overcome by a showing of necessity.

In considering the Service's need for the work-product materials, account must be taken of the very extensive information to which the Service had access. In response to some 275 Information Document Requests, Upjohn furnished the Service with numerous documents and records from its files and those of its branches and subsidiaries relating to the questionable payments discovered in the internal investigation conducted by Upjohn's counsel and voluntarily reported to the Service. Without the necessity of any summons, special agents interrogated in this country or abroad at least 25 senior officials of Upjohn or its subsidiaries, in some instances on more than one occasion.[16] The Service was assured that Upjohn would make available all of the persons who responded to the questionnaire or who were interviewed by its counsel, as well as any other Upjohn employees selected by the Service. With respect to persons resident outside the United States, Upjohn agreed to give notice to the Service when those persons visited the United States.

Additional documents and records were easily obtainable through further information documents requests, by summons or pursuant to the Service's rights

[16] At the time of the hearing before the Magistrate, some 25 officials had been interrogated by the Service. App. 76a. Additional numbers were interrogated by the Service after the hearing.

of inspection. Additional interviews were available upon request or, if the Service preferred, by summons. Certain of the interviews might have required travel abroad, but a special agent made one visit for this purpose to Japan and Hong Kong, and the Service might easily have arranged similar trips elsewhere.[77] Alternatively, the Service might simply have elected to interrogate those stationed overseas when they returned to the United States.

The only "hardship" with which the Service was confronted was the need to utilize the discovery tools provided by Congress. In these circumstances, it cannot be persuasively argued that the Service has "substantial need of the materials" and cannot "without undue hardship . . . obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3).

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[77] It would not even have been essential for a special agent to travel outside the United States. The Service maintains representatives in some 14 foreign cities, carefully located to provide convenient coverage to all parts of the world. [1979] Commissioner of Internal Revenue, Ann. Rep. 23 (1980). Among other things, the representatives assist "in the overseas examination of multinational corporations." *Id.* The representatives could presumably have been instructed to interview some or all of the witnesses resident abroad.

It is significant that claims of hardship based on distance have been rejected in cases involving grand jury investigations in which no reasonable effort was made to secure the testimony of witnesses overseas. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d at 1232-33; *In re* Grand Jury Subpoena Dated December 19, 1978, 599 F.2d at 512-13.

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded with instructions to deny enforcement of the challenged summons to the extent that it calls for documents that are privileged under the subject-matter test or constitute the work-product of Upjohn's lawyers.

Respectfully submitted,

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APPENDIX

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Internal Revenue Code of 1954 (26 U.S.C.)

Section 7402. Jurisdiction of District Courts

(a) *To issue orders, processes, and judgments*

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To enforce summons*

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) *For damages to United States officers or employees*

Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

[(d) *Repealed. Pub. L. 92-310, title II, § 230(d), June 6, 1972, 86 Stat. 209*]

(e) *To quiet title*

The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) *General jurisdiction*

For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

Section 7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give

such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7604. Enforcement of summons.

(a) *Jurisdiction of district court*

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement*

Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(g)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) *Cross references*

(1) Authority to issue orders, processes, and judgments

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) Penalties

For penalties applicable to violation of section 6420 (e)(2), 6421(f)(2), 6424(d)(2), 6427(g)(2), or 7602, see section 7210.

Federal Rules of Civil Procedure

Rule 26(b)(3)

Trial Preparation: Materials. Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)

(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Rule 21(a)(3)

In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

Federal Rule of Evidence 501

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.